

Internal deliberative pre-decisional

# WATER QUALITY STANDARDS

States, Territories, and authorized Tribes establish water quality standards (WQS) for surface waters under Clean Water Act (CWA) Section 303 to protect aquatic life, other wildlife, and human health effects related to swimming, fishing, boating, or use as a source of drinking water or irrigation. The EPA Administrator (or delegated authority) reviews new or revised WQS for consistency with the requirements of the Act and its implementing regulations, has oversight authority to review and either approves within 60 days of submission or disapproves within 90 days of submission of these standards and. The EPA Administrator also has authority to establish federal WQS if he/she (or authorized delegate) determines that they are necessary to meet the requirements of the Act, with specific deadlines established under federal law. Citizens may challenge EPA actions or inaction. There are several ongoing legal cases arising from EPA approval and disapproval actions, and there are several federal WQS rules currently in process. These challenges and actions raise issues related to the type and degree of aquatic life and human health protections that must be provided under the CWA and typically involve input and direction from senior leaders in the Agency. There are several federal WQS rules currently in process.

## UPCOMING MILESTONES:

- **Oregon Aluminum:** EPA is under a consent decree to finalize an aluminum criteria rule for fresh waters in Oregon by December 31, 2020.
- **New York Bacterial Pathogens:** EPA is aiming to propose federal criteria by approximately March/February 12, 2021.
- **Maine Human Health Criteria:** EPA is planning to take final action on its proposal to withdraw federal criteria aiming to withdraw its final rule by approximately January/February 2021.
- **California Selenium:** EPA is aiming planning to promulgate a final rule by approximately October 2021.

## BACKGROUND:

WQS are principally comprised of designated uses (e.g., swimming and fishing) and criteria to protect those uses, as well as antidegradation policies and procedures. Criteria are expressions of water quality attributes and can be expressed as a narrative criteria statement or, often established as specific numeric pollutant levels to be avoided. WQS form a legal basis for controlling pollutants entering the waters of the United States. Under the CWA Section 303(c)(3), EPA has 60 days to review and approve and 90 days to review and disapprove a state or tribal WQS submission for review.<sup>1</sup> If EPA disapproves, states/tribes have 90 days to remedy the situation and disapproval. If the state/tribe does not remedy the disapproval, after which EPA must “promptly propose” (see CWA Section 303(c)(4)) propose a federal WQS rule that meets the requirements of the CWA to replace the disapproved state/tribal rule. Under the Administrative Procedures Act, EPA has 90 days after proposal to promulgate a final rule. In practice, these deadlines are so routinely exceeded, leaving the Agency vulnerable to legal challenges. If a state remedies the situation, disapproval that necessitated a federal rule, EPA typically withdraws the federal rule. If EPA approves a

<sup>1</sup> In practice, these deadlines are frequently exceeded, leaving the Agency vulnerable to legal challenges. EPA has acted on time with respect to the 60/90 day approval/disapproval decisions 59 percent and 45 percent of the time over the past 5 and 10 year period, respectively. Actions that languish for greater periods of time are more likely to elicit challenge.

**Commented [BC1]:** We should share this one with OGC if we haven't already planned for that.

**Commented [KJ2R1]:** We shared with OGC and they made minor edits, tracked in this document.

**Commented [ND3R1]:** Author shows as “Corey Buffo on 10/14/20” – he inserted OGC edits into this master version.

**Commented [BC4]:** Is there a more precise way to describe our authority and what we consider?

**Commented [KJ5R4]:** I tried to make clear that EPA reviews new or revised WQS for consistency with the requirements of the CWA.

**Commented [BC6]:** Why are Maine and Cal. Not mentioned here?

**Commented [KJ7R6]:** I added them in. CA was considered out of the June 2021 window we had been directed to use and Maine is a rather straightforward action we had chosen not to highlight in this section.

**Commented [WA8]:** Why is this so late? If we get it to OMB later this month, we should be able to propose in January, right?

**Commented [KJ9R8]:** I replaced with the latest agreed upon target date.

**Commented [BC10]:** Please be specific on our metrics. How has OST performance been during the last 10 years and 5 years?

**Commented [KJ11R10]:** I added in the requested statistics for the 60/90 day deadlines, and moved it to a footnote after the sentence where these are discussed. With respect to the 90 day deadline to finalize a proposal, this is routinely exceeded. I am not aware of a final WQS rule promulgated 90 days after proposal.

WQS related to aquatic life or other wildlife protection, or if EPA promulgates criteria for protecting aquatic life or other wildlife, the Agency is also obligated to consult with relevant federal agencies to ensure appropriate protection under the Endangered Species Act (ESA). Federal WQS rulemakings currently in process include:

- Federal Aluminum Aquatic Life Criteria Applicable to Fresh Waters in Oregon:** EPA is under a consent decree to promulgate a final rule by December 31, 2020, to establish criteria for fresh waters in Oregon to protect aquatic life from harmful levels of aluminum. EPA disapproved Oregon's freshwater aluminum criteria in 2013, and then ~~a litigant sued EPA was sued (by the state?) to take action~~ promulgate a federal rule that meets the requirements of the CWA replacement. Oregon does not intend to initiate state rulemaking to adopt their own aluminum criteria before promulgation of the federal criteria are promulgated.
- Federal Recreational Water Quality Criteria Applicable to Certain Waters in New York:** EPA is moving to propose federal criteria for bacterial pathogens to protect for swimming in certain marine waters in the vicinity of New York City with a target date of ~~March-February 121, 2021~~. In 2016, EPA approved New York's action to designate these waters for ~~swimming primary contact recreation (e.g., swimming),~~ and in 2018 EPA disapproved the ~~associated criteria New York promulgated because they do not protect swimming primary contact recreation, but instead protect secondary contact recreation (e.g., boating).~~ New York subsequently insisted that their use changes did not ~~equivocate on whether they, in fact, did designate established primary contact recreation as the designated use for these waters swimming,~~ but has not submitted anything to EPA to justify this position. There is ongoing litigation ~~in which NYC-area environmental groups are seeking to force EPA to promulgate protective federal criteria for New York. EPA is moving to propose federal criteria to help avoid a Court ruling to propose and promulgate with very tight deadlines, and to hopefully spur more definitive action from the State. Because of the high volume of combined sewer overflows in New York City, the cost of safely protecting swimming at all times is very high, and the State needs to explain their constraints in a WQS context.~~
- Withdrawal of Certain Federal Water Quality Criteria Applicable to Maine:** On December 19, 2016, EPA published final [ [HYPERLINK "https://www.epa.gov/wqs-tech/proposed-rule-maine-water-quality-standards"](https://www.epa.gov/wqs-tech/proposed-rule-maine-water-quality-standards) ] jurisdiction after disapproving certain ~~state criteria in 2015 because EPA determined at that time that they did not sufficiently protect some designated uses. EPA proposed withdrawing federal human health criteria (HHC) on September 3, 2020, because EPA approved State-adopted human health criteria (HHC) HHC on June 23, 2020 and has proposed withdrawing its federal HHC.~~ EPA anticipates a final rule ~~withdrawing the federal HHC in January/February early 2021.~~
- Final California Statewide Aquatic Life/Wildlife Criteria for Selenium:** EPA is under a consent decree to promulgate a final rule to establish federal criteria to protect aquatic life and aquatic-dependent wildlife from harmful exposure to selenium within six months of completing ESA consultation with the U.S. Fish and Wildlife Service and the U.S. National Marine Fisheries Service (collectively, the Services). EPA intends to transmit a Biological Evaluation to the Services in February/March 2021, with a target date of October 2021 for the final rule. California does not intend to initiate state rulemaking to adopt their own selenium criteria before the federal criteria are promulgated.

**Commented [WA12]:** Shouldn't this be resolved by the time anyone will review these transition papers?

**Commented [KJ13R12]:** It is possible that transition efforts could begin as early as November, but we really don't know.

**Commented [KJ14]:** Charlotte inserted "(by the state?)". It was not the state, but rather an advocacy group. Anna's convention in her comments on this paper is to refer generally to "litigant".

**Commented [WA15]:** Same question above

**Commented [KJ16R15]:** Date changed

**Commented [KJ17]:** New York's criteria are expressed as fecal coliform. There is not science supporting that the fecal coliform indicator is protective of secondary contact activities, such as boating. The agency has consistently maintained this position in our actions.

**Commented [BC18]:** Isn't this internal deliberative?

**Commented [KJ19R18]:** Deleted text.

**Commented [BC20]:** Is this internal deliberative?

**Commented [KJ21R20]:** The terms of the consent decree specify that EPA act upon completion of consultation. Transmittal of a BE is a regular step in this process.

KEY EXTERNAL STAKEHOLDERS:

[ PAGE \\* MERGEFORMAT ]

☒ Congress
 ☒ Industry
 ☒ States
 ☒ Tribes
 ☐ Media
 ☒ Other Federal Agency  
☒ NGO
 ☐ Local Governments
 ☐ Other (name of stakeholder) \_\_\_\_\_

Ongoing WQS litigation:

- Missouri Lakes Numeric Nutrient Criteria Litigation:** On December 3, 2019, an advocacy group challenged EPA's approval of the State's nutrient water quality criteria for lakes as arbitrary and capricious, arguing the criteria do not protect sensitive recreational and drinking water supply uses among other complaints. EPA is in the process of defending the approval action.
- Montana Nutrient Variance Litigation:** In 2019, EPA partially lost a challenge to its 2017 approval of WQS variances in Montana, which are allowances that allow for dischargers to meet less stringent permit limits than would otherwise be necessary to meet the state's criteria for nutrients. EPA is currently appealing this decision. Separately, the same plaintiff is challenging EPA's 2020 approval of a provision that allows the State to void adoption of its nutrient criteria by operation of law because the variances are not in place effect. EPA is in the process of defending this action.
- Idaho Multi-Claim Litigation:** After years of protracted litigation on CWA and ESA-related complaints, a single claim of failure to propose and promulgate federal criteria in response to EPA's 2008 disapproval of Idaho's revised mercury criteria to protect aquatic life remains active in this case. Idaho has in place separate mercury criteria to protect human health, which is thought to be a more sensitive endpoint than aquatic life. EPA is in the process of defending its inaction.
- Washington HHC:** The State of Washington challenged EPA's 2019 reversal reconsideration of a 2016 partial disapproval decision to an approval, EPA's subsequent approval of Washington's water quality standards, and EPA's withdrawal of the federal water quality standards it promulgated while establishing federal HHC in response to the partial disapproval. At stake is the degree of flexibility EPA has to reverse its WQS actions. Parties have completed briefing the initial complaint and are awaiting a decision.
- Oregon ESA/CWA Litigation:** In 2018, one of the parties who brought the Idaho challenges described above an environmental group brought suit against both EPA and the U.S. Fish and Wildlife Service (FWS) alleging that EPA's 2013 and 2014 approvals of water quality criteria for arsenic, selenium, and zinc and that FWS's Biological Opinion violated the APA. The litigant also alleges that EPA violated the Endangered Species Act. The agencies are in the process of defending their actions.
- Washington Aquatic Life Criteria Petition Denial Litigation:** On September 16, 2020, a litigant challenged EPA's denial of a petition for EPA "to update the State of Washington's water quality standards for the protection of aquatic life from toxic contaminants" arguing, among other things, that the denial was not based on sound scientific rationale.
- litigant challenged both EPA and the U.S. Fish and Wildlife Service (FWS) that EPA's 2013 and 2014 approvals of water quality criteria for arsenic, selenium, and zinc were arbitrary and capricious and that both agencies failed to protect listed endangered species. The agencies are in the process of defending their actions.**
- Washington Aquatic Life Criteria Petition Denial Litigation:** On September 16, 2020, the same party as above for the Oregon matter litigant challenged EPA's denial of a petition for EPA "to update the State of Washington's water quality standards for the protection of aquatic life from toxic contaminants" arguing, among other things, that the denial was not based on sound scientific rationale. The Agency will need to conduct internal discussions to decide on a path forward in this matter.

Commented [BC22]: I assume this is already public?

Commented [KJ23R22]: We have a court issued briefing schedule and filed brief, all of which are public.

Commented [WA24]: What does this mean?

Commented [KJ25R24]: I attempted to clarify.

#### MOVING FORWARD:

- ~~New York Water Quality Standards Litigation:~~ September 30, 2020 (Plaintiffs' reply brief); October 30, 2020 (EPA and intervenor-defendants' reply briefs).
- **Oregon Aluminum:** Finalize federal criteria rule by December 31, 2020.
- **California Selenium Statewide:** Transmit a Biological Evaluation to the Services in February/March 2021. Finalize federal criteria rule by approximately October 2021.
- **Idaho Multi-Claim Litigation (remaining mercury claim):** ~~September 25, 2020 (Plaintiffs' summary judgment motion); October 30, 2020 (EPA's cross-motion for summary judgment and response to Plaintiffs' reply brief);~~ November 13, 2020 (EPA's cross-motion for summary judgment); December 18, 2020 (Plaintiffs' reply brief); December 18, 2020 (EPA's reply brief).
- **Oregon ESA/CWA Litigation:** ~~October 23, 2020 (Plaintiff's summary judgment motion);~~ December 11, 2020 (EPA's cross-motion for summary judgment); January 29, 2021 (Plaintiff's reply brief); March 10, 2021 (EPA's reply brief).
- **Missouri Lakes Numeric Nutrient Criteria Litigation:** September 25, 2020 (Plaintiff's Brief in Support of Motion for Summary); November 10, 2020 (EPA's Opposition Brief and Cross-Motion for Summary Judgment); November 30, 2020 (MCE's Reply and Opposition to Cross Motion); January 15, 2021 (EPA's Reply Brief).
- ~~Montana Nutrient Variance Litigation:~~ September 21, 2020 (EPA third brief on cross appeals); September 24, 2020 (oral arguments on non-severability)

**Commented [BC26]:** If needed, these papers would not be used until November.

**Commented [KJ27]:** It is consistent with Charlotte's other comments in this section to delete this text.

LEAD OFFICE/REGION: OW

OTHER KEY OFFICES/REGIONS: OGC, REGIONS